United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24–306 OF 2000
MOHD GHAZALI J
22 MARCH 2001

Civil Procedure *— Locus standi — Shareholder — Derivative action by majority shareholder — Whether majority shareholder could bring derivative action against company — Application of rule in Foss v Harbottle*

Civil Procedure *— Receiver — Appointment — Whether application for appointment of receiver must be made inter partes — Whether breach of natural justice — Rules of the High Court 1980 — O 30 r 1*

The plaintiff and Genisys Integrated Pte Ltd ('Genisys') entered into a shareholders agreement ('the agreement') wherein they incorporated the second defendant. The plaintiff held 51% and Genisys held 49% of the shareholding of the second defendant. The first defendant was appointed a director of the second defendant and was in control of the day to day management. The plaintiff brought the action in its representative capacity and for the benefit of the second defendant, claiming reliefs against the first defendant. The plaintiff alleged that the first defendant had failed to act in the interest of the second defendant in exercising his duties and powers as a director of the second defendant and obtained an ex parte order ('the ex parte order') pursuant to O 30 r 1 of the Rules of the High Court 1980 ('the RHC') that receivers and managers be appointed over the affairs and properties of the second defendant, in relation to the Telekom project. Subsequently, the first defendant filed an application praying that the ex parte order be struck out with costs. The issues for determination were: (i) whether the ex parte order obtained by the plaintiff was null and void for non-compliance of O 30 r 1, ie that an application for the appointment of a receiver under O 30 r 1 must be made inter partes; (ii) whether the ex parte order obtained by the plaintiff was null and void for breach of natural justice; and (iii) whether the plaintiff, being a majority shareholder, had the locus standi to bring a derivative action.

Held, allowing the first defendant's application to set aside the ex parte order obtained by the plaintiff with costs:

(1) The existence of the words 'until after the hearing of a summons for the appointment of the receiver' in O 30 r 1(4) of the RHC would denote that the receiver can only be appointed based upon an inter partes application. Only applications for injunctions

'ancillary or incidental to an order appointing a receiver' may be made by way of ex parte applications, and the appointment of the receiver per se does not fall within the contemplation of those words (see pp 527G, 528A).

(2) The application has also to be heard inter partes because it is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem* (see pp 528H–I, 529B–C)

(3) Only a minority shareholder may bring an action on behalf of himself and all the other shareholders of a company in a derivative action. The plaintiff, being the majority shareholder, did not seem to fall within the contemplation of any of the exceptions to the rule in *Foss v Harbottle*, and hence would not be in a position to bring a derivative action. The proper party to bring an action to remedy the wrongs that the first defendant had allegedly committed would be the second defendant (see p 531C, E–F).

[**Bahasa Malaysia summary**

Plaintif dan Genisys Integrated Pte Ltd ('Genisys') telah mengikat suatu perjanjian pemegang saham ('perjanjian tersebut') dalam mana mereka telah memperbadankan defendan kedua. Plaintif memegang 51% dan Genisys memegang 49% daripada pegangan saham defendan kedua. Defendan pertama telah dilantik sebagai seorang pengarah defendan kedua dan menguasai pengurusan kerja harian yang biasa. Plaintif memulakan tindakan ini sebagai wakil dan untuk manfaat defendan kedua, menuntut relief terhadap defendan pertama. Plaintif mendakwa bahawa defendan pertama telah gagal bertindak dalam kepentingan defendan kedua dalam melaksanakan kewajipan dan kuasanya sebagai seorang pengarah defendan kedua dan plaintif telah memperolehi satu perintah ex parte ('perintah ex parte tersebut') menurut A 30 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') agar penerima dan pengurus dilantik untuk mengawasi hal-ehwal dan harta defendan kedua, berhubung dengan suatu projek Telekom. Berikutnya, defendan pertama memfailkan permohonan memohon agar perintah ex parte tersebut dibatalkan dengan kos. Isu-isu untuk penentuan adalah: (i) sama ada perintah ex parte tersebut yang diperolehi oleh plaintif adalah tak sah dan terbatal kerana ketidakpatuhan A 30 k 1, iaitu bahawa satu permohonan untuk perlantikan seorang penerima di bawah A 30 k 1 mestilah dibuat secara inter partes; (ii) sama ada perintah ex parte tersebut yang diperolehi oleh plaintif adalah tak sah dan terbatal kerana melanggar keadilan asasi; dan (iii) sama ada plaintif, sebagai pemegang saham majoriti, mempunyai locus standi untuk memulakan tindakan terbitan (derivative action).

Diputuskan, membenarkan permohonan defendan pertama untuk mengetepikan perintah ex parte tersebut yang diperolehi oleh plaintif dengan kos:

(1) Kewujudan kata-kata 'sehingga selepas pembicaraan saman untuk perlantikan penerima' (until after the hearing of a summons for the appointment of the receiver) dalam A 30 k 1(4) KMT menunjukkan bahawa penerima hanya boleh dilantik berdasarkan satu permohonan inter partes. Hanya permohonan-permohonan untuk injunksi 'sampingan atau berkaitan dengan suatu perintah melantik penerima' (ancillary or incidental to an order appointing a receiver) boleh dibuat melalui permohonan ex parte, dan perlantikan penerima per se tidak digolongkan dalam pertimbangan kata-kata tersebut (lihat ms 527G, 528A).

(2) Permohonan tersebut juga harus didengar secara inter partes kerana ia adalah merupakan suatu prinsip am tafsiran berkanun bahawa melainkan hasrat bertentangan menonjol, suatu penggubalan menerusi implikasi akan mengimport pemakaian prinsip maxim audi alteram partem (lihat ms 528H–I, 529B–C).

(3) Hanya pemegang saham minoriti boleh memulakan tindakan bagi pihak dirinya dan bagi pihak semua pemegang saham syarikat yang lain dalam satu tindakan terbitan. Plaintif, sebagai pemegang saham majoriti, nampaknya tidak dirangkumi oleh mana-mana kekecualian kepada rukun dalam *Foss v Harbottle*, dan justeru itu tidak berada dalam kedudukan untuk memulakan tindakan terbitan. Pihak yang wajar memulakan tindakan untuk membetulkan kesalahan yang kononnya telah dilakukan oleh defendan pertama adalah defendan kedua (lihat ms 531C, E–F).]

Notes

For cases on appointment of receiver, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5029–5035.

For cases on locus standing of shareholder, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3967–3968.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 (refd)

Bond Brewing Holdings Ltd & Ors v National Australia Bank Ltd & Ors (1989–1990) 1 ACSR 445 (refd)

Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia) [1997] 3 MLJ 671 (refd)

Duffy v Super Centre Development Corp Ltd [1967] 1 NSWR 38 (refd)

Foss v Harbottle (1843) 2 Hare 461 (refd)

H's Estate, Re (1875) 1 Ch D 276 (refd)

Hwang Ju-In v Huang Han Chao [1977] 2 MLJ 229 (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)
Pountain, Re (1887) 37 Ch D 609 (refd)
Setapak Tin Syndicate Ltd & Anor v Choo Kim Peng [1947] MLJ 174 (refd)
Shaik Lebbai Maricar v Haji Mohamed Eusope & Ors [1929] SSLR 141 (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487 (refd)
Walbrook & Co v Jones & Lewis (1887) 3 TLR 609 (refd)

Legislation referred to

Companies Act 1965 ss 132(1), 132C(1), (2), (5), 144(1), (3), 145, 169
Rules of the High Court 198 O 29 r 1(2B), O 30 rr 1, 2, 3, 4, O 32 r 6, O 83 r 2(4)

Zaki Azmi (*Harjinder Kaur* with him) (*Rashid & Lee*) for the plaintiff.
Mohamed Zaini Haji Mazlan (*Gideon Tan* with him) (*Gideon Tan Razali Zaini*) for the first defendant.

Mohd Ghazali J:. The plaintiff is a shareholder of the second defendant, and the first defendant is a director of the second defendant. On 8 December 2000, the plaintiff, which is bringing this action in its representative capacity, and for the benefit of the second defendant, filed this originating summons praying for the following orders:

(i) a declaration that the first defendant has breached his fiduciary duty as a director of the second defendant;
(ii) an injunction to restrain the first defendant whether by himself, his officers, servants, agents, nominees or howsoever otherwise from preparing and/or signing and/or causing the signing of any cheques of the second defendant;
(iii) an injunction to restrain the first defendant whether by himself, his officer, servants, agents, nominees or howsoever otherwise from disposing or dealing with any property of the second defendant;
(iv) an order directing the first defendant to return all monies used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the second defendant;
(v) an order directing the first defendant to return all properties used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the second defendant;
(vi) an order that the plaintiff be at liberty to enforce and/or execute on any order made hereunder;
(vii) an order that the second defendant indemnifies the plaintiff for costs of the action;
(viii) costs; and
(ix) such further and other orders as the court deems fit.

The grounds forwarded for filing the originating summons are as follows:

(a) two of the directors of the second defendant in conducting a review on the second defendant have discovered numerous discrepancies and irregularities in the management of the second defendant;

(b) the said two directors have made several inquiries to the first defendant to clarify these irregularities, but the first defendant has failed or refused to clarify the issues;

(c) the first defendant has side stepped and wilfully refused to clarify the issues even in the light of the several discrepancies and irregularities pointed out by the said two directors;

(d) the plaintiff is concerned that monies belonging to the second defendant are unaccounted for, and no explanations have been given for the discrepancies in the accounts of the second defendant, although numerous requests have been made for the same;

(e) the plaintiff as a shareholder of the second defendant is concerned with any potential claims against the second defendant.

On 3 January 2001, the plaintiff filed an ex parte summons in chambers (encl 5) and prayed for, inter alia, the following orders:

(1) That one Kenneth Teh Kiam and one Gong Wee Ning of Pricewaterhouse Coopers or some other fit and proper person or persons, without security, jointly and severally be appointed as receivers and managers to receive and manage the affairs and properties of the second defendant, and submit all accounts to the relevant bodies, and to do, inter alia, one or more of the following:

(i) to appoint auditors and accountants to carry out the internal and external audits on the second defendant and to take all necessary steps to regularize the second defendant's accounts in relation to a project that is being undertaken by the second defendant, namely, the Telekom project ('the said Telekom project')

(ii) to take possession, control, custody and to get in to the business address and the registered office and any other offices of the second defendant, and to take possession, control custody of and to get in, receive and store all assets, properties and effects of business, monies, stock in trade, securities, deeds, books and documents in relation to the second defendant;

(iii) to carry out as the receivers and managers deem fit any work on the said Telekom project, and in general to do all such things as may be necessary for the completion of that project so far as it is possible;

(iv) so far as it is possible, to complete the mechanical and engineering works carried out by the second defendant in the said Telekom project;

(v) to ensure that all subcontractors and suppliers of the second defendant carry out their obligations.

The facts leading to the application, as stated in the plaintiff's affidavit in support, are as follows:

(1) On 2 November 1993, the plaintiff and Genisys Integrated Pte Ltd, a

company incorporated in Singapore ('Genisys') entered into a shareholders agreement ('the said agreement') wherein they agreed to form and incorporate a joint venture company called UEM Genisys Sdn Bhd, ie the second defendant.

(2) Pursuant to the said agreement it was agreed that the plaintiff shall hold 51% and Genisys shall hold 49% of the shareholding of the second defendant.

(3) Pursuant to the said agreement, the plaintiff was to nominate two directors and Genisys was to nominate two directors respectively to the board of directors of the second defendant.

(4) It was a term of the said agreement that the day to day management of the second defendant is assigned to the first defendant.

The above terms of the said agreement were carried out, and the second defendant went about its business. The plaintiff had nominated one Sulaihah Maimunni and one Mohd Zaki Hamdan, and Genisys had nominated the first defendant and one Soh Lup Chee respectively to sit on the board of the second defendant.

Between October 1998 to the middle of the year 2000, there were negotiations between the plaintiff and the first defendant representing Genisys whereby the plaintiff made an offer to sell the shares held by the plaintiff in the second defendant to Genisys. The proposed offer to sell and purchase could not materialize due to the non agreement of the terms of a bank guarantee that the plaintiff had requested the first defendant to furnish, and the final offer by the plaintiff subsequently lapsed.

It is the plaintiff's case that the second defendant had last filed its audited accounts for the financial year ending 31 December 1998, but thereafter failed to prepare any statement of accounts, and the plaintiff is unaware of the actual status of the accounts of the second defendant. From early 1999, the plaintiff has sent several memorandum and letters to the second defendant requesting the latter to forward its monthly management reports to the plaintiff to enable the plaintiff to prepare group reports, the plaintiff being a public listed company, and the second defendant being a subsidiary of the plaintiff, but this was met with little response. In July 2000, representatives from the audit department of the plaintiff, headed by one Amir Fizal Hamzah had, on three occasions, attempted to conduct an internal audit at the business address of the second defendant but was denied access by its finance manager, one Azni Amran on the instructions of the first defendant. The plaintiff pointed out to the second defendant that pursuant to cl 11.3 of the said agreement, the directors of the second defendant are to have full access to the books of accounts and other records of the second defendant. The two said directors of the second defendant nominated by the plaintiff, viz Sulaihah Maimunni and Mohd Zaki Hamdan consequently signed a letter of authorization authorizing and delegating their powers to the said Amir Fizal Hamzah to access and review the books of accounts. By a letter dated 3 August 2000, the first defendant, as managing director of Genisys, informed the plaintiff that the internal audit department of the plaintiff is not entitled to have access to the accounts of the second defendant, and that only the directors of the second

A defendant were allowed such access.

Later, also in the month of August 2000, four further attempts to do the same were made by the said Sulaihah Maimunni and Mohd Zaki Hamdan, together with the said Amir Fizal Hamzah. On these occasions, the response was as slightly better. However, they were only allowed to conduct a review
B of certain documents. The first defendant was not fully cooperative and had refused the documents they requested for. Later in the month, at a meeting of the board of directors held on 25 August 2000, it was resolved, inter alia that the said Azni Amran, the finance manager of the second defendant be removed as a cheque signatory of the second defendant. On 6 September 2000, Genisys, in a separate suit, obtained an interlocutory injunction
C restraining the plaintiff, the second defendant and its directors and company secretary, from implementing, acting upon, enforcing, affecting or purporting to implement, act upon, enforce or give effect to the resolutions passed at the board of directors meeting held on 25 August 2000.

On 9 September 2000, the first defendant lodged a police report against
D the said Azni Amran stating therein that Azni Amran had admitted taking a sum of RM250,000 and a sum of RM125,000 on 4 April 2000 and 25 May 2000 respectively, from the second defendant. On 15 September 2000, the said Sulaihah Maimunni lodged a police report against the said Azni Amran in relation to certain discoveries made during her review of the documents of the second defendant. On the same date, the said Sulaihah Maimunni
E and Mohd Zaki Hamdan lodged another police report in relation to the issuance of a cash cheque in the sum of RM50,000 to one Elton Sun Kim Cheng, an ex employee of the second defendant. Prior to this, the said Sulaihah Maimunni had written to the first defendant requesting clarification of, inter alia, the said cash cheque of RM50,000, but up to date there has been no response.

F

The plaintiff has been awarded the mechanical and engineering works ('the said works') in the said Telekom project from the main contractor, namely DPJV pursuant to two letters of award dated 20 June 1996. Since the said works have been undertaken by the second defendant on behalf of the plaintiff, documentation relating to the said Telekom project is retained
G at the second defendant's office. The second defendant, having undertaken the said works on behalf of the plaintiff, has, in turn, engaged subcontractors to supply goods and carry out the said works. The subcontractors have now brought to the attention of the plaintiff that they have not been paid for a substantial amount of the work they have carried out for the second defendant, although they have made claims and requests
H for the payment from the first defendant.

The plaintiff stated that it had retained progress payment in the sum of RM9m received from the employer, Telekom Bhd, and the plaintiff has not made payment to the second defendant as the plaintiff wishes to ensure that payments are made to the subcontractors, or to procure the court appointed
I receivers and managers to do the same. The plaintiff is concerned that if this progress payment in the sum of RM9m is given to the second defendant, the first defendant may use these funds for his own personal use, as he may

have previously done, and not make payments to the subcontractors. The plaintiff is also concerned of the risk of legal proceedings against the second defendant by the subcontractors for non-payment for work carried out and for goods delivered. It is the plaintiff's stand that the first defendant has clearly failed to act in the interest of the second defendant in exercising his duties and powers of a director of the second defendant, and an appointment of receivers and managers will solve this problem as such receivers and managers will be able to make all necessary payments to the subcontractors and investigate into any irregularities in the second defendant.

The plaintiff stressed there is great concern about the way the affairs of the second defendant is being run by the first defendant, and accordingly, there is a need for the appointment of receivers and managers immediately to regularize any possible irregularities in the second defendant. It is also their contention that the first defendant, as director of the second defendant, has clearly not taken into consideration the interests of the second defendant in his actions as a director of the second defendant.

At the hearing of the ex parte application (encl 5), counsel for the plaintiff explained that the application is made pursuant to O 30 r 1 of the Rules of the High Court 1980 ('the RHC'). Order 30 r 1 of the RHC which is entitled 'Receivers' reads:

> (1) An application for the appointment of a receiver may be made by summons or motion.
>
> (2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such an order.
>
> (3) Where the applicant wishes to apply for the immediate grant of such injunction, he may do so *ex parte* by summons supported by an affidavit.
>
> (4) The court hearing an application under para 3 may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons returnable on such date as the court may direct, to be issued.

Counsel explained that the plaintiff has brought what is known as a 'derivative action'. He submitted that the general principle is that a member/shareholder may not sue to enforce a company's rights, ie, the 'proper plaintiff rule'. He then referred to Ch 9 of Walter Woon's *Company Law* (2nd Ed) entitled *Enforcement of Corporate Rights* at p 317 which reads:

> A company is an entity separate from its members. Because of this, a member may not sue to enforce a company's right. Thus, if a contracting party does not perform a contract made with the company, it is for the company to sue; if a director breaches his duty to the company, only the company has the right to sue. A member cannot sue on the company's behalf in such situations. This rule is known as the 'proper plaintiff rule' or the 'rule in *Foss v Harbottle*', after the case in which it was first definitively settled.
>
> *Foss v Harbottle* (1843) 2 Hare 461 (Vice Chancellor's Court, England).

A Two shareholders in the company brought an action against the company's directors and other persons. It was alleged that the property of the company had been misapplied and that certain transactions were entered into improperly. The Vice-Chancellor held that the conduct with which the defendants were charged was not an injury to the plaintiffs exclusively; it was an injury to the corporation as a whole. The corporation and the members are B not the same thing. Accordingly, the action could not be maintained by the plaintiffs.

Foss v Harbottle established that the proper plaintiff in a suit for the enforcement of a corporate right is the company itself.

Counsel submitted there are exceptions to the 'proper plaintiff' rule, both C at common law and statute. Reference was again made to the same book at p 325 which reads:

> The 'proper plaintiff' aspect of the rule in *Foss v Harbottle* does not apply where what is complained of is not a wrong to the company, but an injury to a member personally. If a member's personal rights are infringed, he may sue for a personal remedy and the directors and majority members cannot stop D him.

Counsel also referred to p 327 of the same book where the learned writer said:

> If a member chooses to sue the defendants in his own name to enforce the company's rights, this is known as a derivative action. This is because the E member is not suing to enforce his own rights, but that of the company's. Any right that he has 'derives' from that of the company. By the same token, any remedy that he obtains is for the company. A person bringing a derivative action cannot have any larger right of relief than the company itself. Although the action is brought in the name of the member, in reality it is the company's rights that are being litigated. As there is no procedure prescribed of a F derivative action, it will take the form of a representative action. The company is added to the action as a nominal defendant so that it may be bound by the result.

Counsel then made reference to several exceptions which have developed to the rule in *Foss v Harbottle* (1843) 2 Hare 461, as set out by Edgar Joseph Jr J (as he then was) in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 at p 502:

G

> The rule was not applied universally; several exceptions developed, which were outlined by Jenkins LJ in *Edward v Halliwell*, thus at p 1067.
>
> (1) Ultra vires acts: 'in cases where the acts complained of are wholly ultra vires the company or association the rule has no application because there H is no question of the transaction being confirmed by any majority.'
>
> (2) Fraud on the minority; 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all I others'.
>
> (3) Special majorities; 'an individual member [is not] prevented from suing if the matter … [is] one which could validly be done or sanctioned, not

by a simple majority of the members … but only by some special majority'. A

(4) Personal rights: Where 'the personal and individual rights of members of [the plaintiffs] have been invaded', the rule 'has no application at all'.

(5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)*. B

Counsel then explained that the reason why this application was made ex parte was because the plaintiff had to act quickly under the circumstances as there was an immediate danger that the first defendant may dissipate the assets of the second defendant and destroy relevant company documents. In his written skeletal submission, counsel had C referred, amongst others, to the case of *Setapak Tin Syndicate Ltd & Anor v Choo Kim Peng* [1947] MLJ 174. In that case, the plaintiff and another company, both in voluntary liquidation, applied by their respective liquidators, by motion, for an order that an interim receiver be appointed of certain mining property in Kuala Lumpur. Willan CJ was of the view D that in such an application, the court must be satisfied on two matters, namely:

(a) that the party applying for the receiver must have a prima facie interest in the property; and

(b) that the property must be in danger. E

Counsel also made reference to the case of *Re Pountain* (1887) 37 Ch D 609, where it was held that in a proper case, the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent, will do so upon an ex parte application, and in the case of *Re H's Estate* (1875) 1 Ch D 276, where it F was held that where bankruptcy and consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in an action. Counsel then pointed out that the first defendant is not a Malaysian citizen, and in this context referred to the case of *Shaik Lebbai Maricar v Haji Mohamed Eusope & Ors* [1929] SSLR 141, where it was held that the foreign residence of a trustee is a good ground for the appointment of a G receiver.

In conclusion, counsel contended the facts as laid down in the plaintiff's affidavit in support show that there was no cooperation amongst the directors of the second defendant, and the relationship is not cordial and hence, this would necessitate the appointment of receivers and managers H with a view to enable the second defendant to carry out its obligations, especially in relation to the said Telekom project. Reference was also made to the case of *Hwang Ju-In v Huang Han Chao* [1977] 2 MLJ 229. In that case, the parties' partnership was dissolved in 1970 and since then the books of the partnership were retained by the respondent. There was little cooperation between the parties, as a result of which the appellant applied I for the appointment of a receiver and accounts to be taken. Choor Singh J found there was no cooperation at all between the parties and decided it was

A desirable that an independent third party, such as the receiver, take over the affairs of the partnership.

I had on 18 January 2001, allowed the ex parte application of the plaintiff and granted the order sought for, viz, that the two said persons named therein be appointed as receivers and managers to receive and manage the affairs and properties of the second defendant, only in relation to the said Telekom project on the grounds that the plaintiff had shown to the court the following:

(i) that the plaintiff has a prima facie interest in the said works being carried out under the said Telekom project which is being undertaken by the second defendant, and which is still on going;

(ii) that the said Telekom project is in danger due to defaults in making payments to subcontractors for works completed thereunder;

(iii) that there is little cooperation amongst the directors of the second defendant which prevents its affairs from being carried on properly; and

(iv) that it would be desirable that receivers and managers take over the affairs of the second defendant in relation to the said Telekom project until the hearing of the originating summons.

On 23 January 2001, the first defendant, in response to the ex parte order that I granted to the plaintiff ('the said ex parte order'), filed an ex parte order summons in chambers (encl 11), praying for the following orders:

(i) that the said ex parte order be stayed until the same be heard inter partes; or

(ii) in the alternative, that the said ex parte order be struck off with costs, and that encl 5 be heard inter partes.

Then, grounds forwarded by the first defendant in his application were:

(a) that the plaintiff failed to show that the second defendant was in immediate danger and would be in a worse situation if the receivers and managers were not appointed;

(b) that the plaintiff failed to state the full facts and especially the fact that all cheques to be issued by the second defendant would require the signatures of the directors appointed by the plaintiff; and

(c) that it was the plaintiff that caused the second defendant to be in immediate danger as it failed to pay its debts owing to the second defendant.

Upon being informed of this ex parte application of the first defendant (encl 11), which was accompanied by a certificate of urgency, on the day it was filed, ie 23 January 2001, I instructed the deputy registrar to inform solicitors for the first defendant that encl 11 has to be heard inter partes, and that the relevant cause papers be served on the plaintiff. The first defendant has since filed on appeal to the Court of Appeal against this direction. Be that as it may, encl 11 was fixed for hearing on 31 January 2001. However,

on 31 January 2001, at the request of counsel for the first defendant, hearing of encl 11 was adjourned to 9 February 2001. On 9 February 2001, hearing of encl 11 was again adjourned as both parties had filed further affidavits at the eleventh hour. Enclosure 11 was finally heard on 14 February 2001, and at the end of the day I reserved my decision to a date to be fixed.

At the outset of the hearing of encl 11, counsel for the first defendant informed the court that he had decided to pursue only part of the second prayer to the application, namely, that the said ex parte order be struck out with costs. Upon being asked as to whether I would be in a position to set aside the said ex parte order, counsel for first the defendant answered in the affirmative and contended his application is made pursuant to O 32 r 6 of the RHC which reads 'The court may set aside an order made ex parte'. He then referred to the case of *Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 3 MLJ 671 at p 678 where Mahadev Shankar JCA said:

> Notwithstanding s 67 of the Courts of Judicature Act 1964, the proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is not to appeal but to apply to have it set aside by the judge who made it (see O 13 r 8, O 14 r 11, O 19 r 9, O 32 r 6 or O 35 r 2 of the RHC read with r 14 of the Rules).

Counsel also referred to the *Malaysian Court Practice High Court Vol 1*, a publication of the *Malayan Law Journal*, in relation to O 32 r 6 of the RHC found at pp 2255–2256 which read:

> [32.6.1]Scope of the rule:
>
> This rule protects the basic right accorded to litigants, that a party who has not had an opportunity of being heard may apply to the court to discharge an order obtained in his absence (*Boyle v Sacker* (1888) 39 Ch D 249 at p 251).
>
> [32.6.2]Setting aside an ex parte order:
>
> After issuing an ex parte order, a judge does not become functus officio. Under O 28 r 4(1) (originating summons procedure), the ex parte order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. An application to set aside an ex parte order is not an appeal so as to require a court of superior jurisdiction to deal with it; a court of coordinate jurisdiction may exercise the power; see *Lee Phet Boon v Hoch Thai Finance Corp Bhd* [1994] 1 MLJ 448 and *Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 3 MLJ 671 (CA).

Having submitted that the court has the power to set aside its own order made ex parte, counsel forwarded the following reasons as to why he made the application, viz:

(a) the said ex parte order obtained by the plaintiff is null and void on the following grounds:
   (i) non-compliance of O 30 r 1 of the rules;
   (ii) breach of natural justice.

(b) the plaintiff has no locus standi to make the application.

On the issue of non-compliance of O 30 r 1 of the RHC, counsel argued that an application for the appointment of a receiver under O 30 r 1 of the RHC must be made inter partes. He pointed out that O 30 r 2 of the RHC provides that an application for an injunction, ancillary or incidental to an order appointing a receiver, may be joined with the application to such an order, and O 30 r 3 of the RHC provides that it is only where the applicant wishes to apply for the immediate grant of such injunction, that he may do so ex parte by summons. Order 30 r 4 of the RHC provides that the court hearing such an ex parte application may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver, and may require such a summons to be returnable on such date as the court may direct, to be issued. Thus, from his reading of O 30 of the RHC, counsel contended that any application for the appointment of a receiver under r 1of that order must be made inter partes, and the said ex parte order, which was obtained by the plaintiff on 18 January 2001, is null and void since the said rule was not adhered to.

On the issue of breach of natural justice, counsel contended that O 30 r 1 of the RHC was promulgated to give the party against whom such an order is to be made a chance to be heard, as the receiver, if appointed, will come into possession of the assets of that party and manage those assets. Without giving a chance to be heard to the party against whom such an order has been made is tantamount to a breach of natural justice.

On the issue of locus standi, counsel argued that the plaintiff is a majority shareholder of the second defendant, viz it holds 51% of the issued share capital. Being the majority shareholder, it cannot at all fall within the exceptions to the rule in *Foss v Harbottle* referred to earlier as set out by Edgar Joseph Jr J in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors*. As such, the plaintiff cannot claim that this a derivative action as only a minority shareholder may bring such an action. Furthermore, the plaintiff, for the purpose of this action, is relying on s 132 of the Companies Act 1965 ('the Act'), which is a provision dealing with liability of directors. Section 132(1) of the Act provides 'A director shall, at all times, act honestly and use reasonable diligence in the discharge of the duties of his office.' Since the acts complained of in this action relates more to the liability of a director, ie the first defendant, it is the company, ie the second defendant, who should be bringing this action and not a shareholder, a majority one at that.

On the issue as to whether the court has the capacity to set aside its own order made ex parte, counsel for the plaintiff agreed with what has been submitted by counsel for the first defendant. I have mulled over the matter and I am satisfied that based upon what has been submitted, I have the power to set aside my own order made ex parte. I do not propose to delve further on this issue as this point is not in dispute.

In relation to his contention that an application for the appointment of a receiver made pursuant to O 30 r 1 of the RHC must be made inter partes,

counsel for the first defendant made reference to the case of *Bond Brewing Holdings Ltd & Ors v National Australia Bank Ltd & Ors* (1989–1990) 1 ACSR 445. In that case, the appellants appealed to the Supreme Court of Victoria against an order appointing receivers and managers made by Beach J on an ex parte application by the respondents, and the same judge's refusal to vacate that order. In allowing the appeal, Kaye, Murphy and Brooking JJ held, inter alia, that:

(i) the appointment of a receiver, like any other equitable remedy, is to be had only where the remedies obtainable at law are inadequate to meet the ends of justice; the inadequacy of legal remedies is a condition for the proper exercise of equitable jurisdiction rather than the foundation of the jurisdiction itself;

(ii) there is no principle that a receiver may be appointed only on the application of a person who asserts some proprietary interest in the property concerned; what the applicant must show is that he has some legal or equitable right which will be protected or enforced by the making of the order sought and that no other available remedy is adequate for that purpose;

(iii) an ex parte application for a receiver should not be granted except in case of emergency; on such an application the court should consider whether an interlocutory injunction would suffice, and whether the usual undertaking as to damages should be required;

(iv) the respondents had acted unfairly by deliberately failing to give effective notice to the appellants and then seeking an oppressive order ex parte;

(v) an ex parte order of this kind should not have been expressed to operate pending further order;

(vi) if any relief was to be given under the circumstances, an interlocutory injunction would have been sufficient.

In their judgment, the learned judges of the Supreme Court said (at pp 456–457):

> The appointment of a receiver which is to be, so to speak, at the expense of the defendant's possession and without his consent is a step never to be taken without proper consideration of the defendant's position. … Where a receiver is sought, not merely of a particular asset of the defendant, but of all his assets, particular caution is required and where, as in the present case, the receiver is to possess himself and to manage the assets and undertaking of a collection of companies which, whether they are solvent or not, are in a very large way of business, very great circumspection is required. Of course in a strong enough case the court might, without warning to a trading company, divest it of control of its undertaking and assets. But it must always be borne in mind that the appointment of a receiver in such a case authorises an irresistible invasion and that even if the army of occupation is withdrawn after only a short time things may never be the same again. Rights of property and the company's privacy are violated. Only the most pressing need can warrant such an invasion without notice. Quite apart from the taking out of the companies hands of control of their assets and the management of their businesses, there was in the present case the added consideration (which will not infrequently be present where a receiver is appointed to a company) that the making of the order might well have most serious legal consequences for the companies or

for related companies having regard to the terms of the securities given by them. And in addition to the legal consequences there was the commercial consideration that, as Picarda, Receivers and Managers p 4 has observed, the receiver is often seen not as the company doctor but as the undertaker, so that a blow is struck to the standing and credit of the defendants.

Applications for the appointment of a receiver made without any, or any, adequate, notice to the defendant, like applications for an interim injunction made in similar circumstances, are, or should be, granted sparingly. … To return to the present case, the order was sought without effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings.

The learned judges then went on to state that since the order was sought without any effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings, under those circumstances it was necessary for the applicant to show he has a most powerful case of apprehended injury. The learned judges were of the view that ex parte applications for the appointment of a receiver ought not to be granted except in a case of emergency. The applicant must show that the circumstances are extraordinary, and the court must determine whether a sufficient case of emergency has been shown to warrant the particular order sought. The learned judges also observed that according to Fry LJ, in the practice of the Court of Chancery, the ex parte appointment of a receiver is almost unknown (*Walbrook & Co v Jones & Lewis* (1887) 3 TLR 609 at p 610).

The learned judges went on to say (at p 458):

The drastic nature of the power to appoint a receiver is emphasized in the decisions mentioned in 65 Amer Juris 2d para 20, where authority is cited for the propositions that the power is a drastic, harsh and dangerous one and should be exercised with care and caution, that receivership is a drastic course allowed only under pressing circumstances and granted only with reluctance and caution and that the appointment of a receiver is an extraordinary drastic remedy, to be exercised with utmost care and caution and only where the court is satisfied there is imminent danger of loss if it is not to be exercised.

Counsel for the first defendant insisted that as an order for the appointment of receivers and managers made under O 30 r 1 of the RHC would have no time frame, as opposed to an application for an injunction ancillary or incidental to an order appointing a receiver which may be made ex parte by summons, and which by virtue of O 29 r 1(2B) of the RHC would only have a life span of 21 days, the application for such appointment must be made inter partes. As such, he insisted that the ex parte order granted to the plaintiff on 18 January 2001 is null and void as it was not made in accordance with the procedure set out under O 30 r 1 of the RHC, and that being the position, there has been a breach of the rules of natural justice as the first defendant was deprived of his right to be heard. Counsel argued that O 30 r 1 of the RHC was drafted in such a manner so as to give all parties which are going to be affected by such an order a right to be heard. Counsel then referred to the case of *Muniandy a/l Thamba Kaundan & Anor*

v D & C Bank Bhd & Anor [1996] 1 MLJ 374. That case relates to a charge action, and the complain there was that the first respondent failed to notify the appellants of the date of the adjourned hearing. Counsel for the chargors had contended that the ex parte orders obtained in that case had been rendered null and void as there had been a breach of the rule of natural justice expressed in the maxim *audi alteram partem*, reinforced by O 83 r 2(4) of the RHC which provides:

> Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than two clear days before the day fixed for the hearing.
>
> A copy of any affidavit served under this paragraph must be indorsed in accordance with para (3).

Edgar Joseph Jr FCJ held that the effect of that failure was of such fundamental importance as to render each and every one of the ex parte orders obtained a nullity. He said (at pp 381–382):

> … I consider that O 83 r 2(4) has a common law content. In other words, in my view, O 83 r 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O 83 r 2(4) did not apply. It is a familiar canon of statutory interpretation unless a contrary intention appears, an enactment by implication imports the principle of the maxim audi alteram partem.

It must be noted that O 83 of the RHC specifically deals with charge actions.

On the issue of locus standi, counsel for the first defendant contended only a minority shareholder is entitled to bring a derivative action, and the plaintiff, being a majority shareholder has no locus standi to do so. In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, which was referred to by both counsel in their submission, as to what a derivative action was, Gopal Sri Ram JCA said (at p 427) it is:

> … an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

On the issue of non compliance of O 30 r 1 of the RHC, to recapitulate, the plaintiff had begun this action by originating summons (encl 1) claiming that it was bringing this action in its representative capacity, and for the benefit of the second defendant. Amongst the prayers sought for is a declaration that the first defendant had breached his fiduciary duty as a director of the second defendant. The plaintiff is also seeking injunctions to restrain the first defendant, whether by himself or howsoever otherwise, from signing and/or causing the signing of any cheques of the second defendant, and from disposing or dealing with any property of the second defendant. Further, the plaintiff is seeking orders directing the first defendant to return all monies used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the second defendant and to return all properties used and/or acquired by himself (if any), or third parties in breach of his fiduciary duty as a director of the second defendant. The plaintiff has not included a prayer for the appointment of a receiver, but has included a prayer for 'such further and other orders as the court deems fit'. I would now think that it being a substantial object of the action, a claim for such an appointment should have been indorsed in the originating summons itself. Be that as it may, as discussed earlier, vide an ex parte summons in chambers (encl 5), the plaintiff applied for the appointment of receivers and managers pursuant to O 30 r 1(1) of the RHC which provides that an application for the appointment of a receiver may be made by summons or motion. Order 30 r 1(2) of the RHC provides that 'an application for an injunction, ancillary or incidental to an order appointing a receiver, may be joined with the application for such an order'. Order 30 r 1(3) of the RHC, read together with r 1(4), provides that where the applicant wishes to apply for the immediate grant of such injunction, ie an injunction ancillary or incidental to an order appointing a receiver, he may do so ex parte by summons supported by an affidavit, and the court, hearing an application under O 30 r 1(3) of the RHC 'may grant' an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver, and may require that such summons be returnable on such a date as the court may direct, to be issued'. From my reading, the words in italics above would denote that an application for the appointment of a receiver must be made inter partes and not ex parte, as had been done in the instant case. Only applications for injunctions 'ancillary or incidental to an order appointing a receiver' may be made by way of ex parte applications, and the appointment of the receiver per se does not fall within the contemplation of those words. In encl 5, besides applying for the appointment of receivers and managers, the plaintiff has also sought, inter alia, for an order, which was granted, that the receiver be allowed 'to take possession, control, custody and to get in to the business address and the registered office and any other offices of the second defendant and to take possession, control custody of and to get in, receive and store all assets, properties and effects of business, monies, stock in trade, securities, deeds, books and documents

in relation to the second defendant'. That order, without doubt, is injunctory in nature. It can only be granted as a consequence of a receiver being appointed, and since it is now my view that the existence of the words 'until after the hearing of a summons for the appointment of the receiver' in O 30 r 1(4) of the RHC would denote that the receiver can only be appointed based upon an inter partes application, that injunctory order granted would not be able to stand by itself. Consequently, the other consequential orders granted also cannot stand.

On the whole, I would tend to agree with the contention of counsel for the first defendant that an application for the appointment of a receiver under O 30 r 1(1) of the RHC has to be made inter partes. In *Setapak Tin Syndicate Ltd & Anor v Choo Kim Peng* which was cited by counsel for the plaintiff, what is glaring in that case is that the application was heard inter partes. In that case, the application to appoint an interim receiver was dismissed by the court on the grounds that the plaintiffs have not established a prima facie claim to title over the property in dispute and so the court would not be justified in appointing an interim receiver and turning the defendant out of possession. Furthermore, it had not proved that the property was in jeopardy. The circumstances present in *Hwang Ju-In v Huang Han Chao* and *Shaik Lebbai Maricar v Haji Mohamed Eusope & Ors*, referred to earlier, are also similar, namely, the applications were heard inter partes. In the case of *Re Pountain*, which was cited by counsel for the plaintiff, the court held that in a proper case, it will allow the appointment of an interim receiver upon an ex parte application if the case was urgent, but that case relates to an appointment of an interim receiver of the estate of a supposed lunatic. The circumstances present in the instant case are clearly different.

It is my view, from my reading of O 30 r 1 of the RHC, that an application for the appointment of a receiver has to be made inter partes. Order 30 r 1 of the RHC does provide that the court may grant an interim injunction on an ex parte application to restrain the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property prior to the hearing of a summons for the appointment of the receiver but for the appointment itself, it is my view that it must be by way of an inter partes application. As observed by the learned judges in *Bond Brewing Holdings Ltd & Ors v National Bank of Australia Ltd & Ors*, referred to earlier, in the practice of the Court of Chancery, the ex parte appointment of a receiver is almost unknown. In that case the court frowned upon such an appointment based upon an ex parte application, and held that it should not be granted except in cases of emergency. The court was of the view that the applicant must show that the circumstances of his case are extraordinary. He should also show he has 'a most powerful case of apprehended injury'. On the whole, the court was of the view that such an order should be granted sparingly. Be that as it may, I am of the view that an application for the appointment of a receiver made pursuant to O 30 r 1 of the RHC must be made inter partes. I would agree with the contention of counsel for the first

defendant on this issue, and on this basis alone I would set aside the said ex parte order that I granted to the plaintiff on 18 January 2001.

In relation to the issue that there has been a breach of the rule of natural justice, counsel for the first defendant referred to the case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor*. In that case, which relates to a charge action, O 83 r 2(4) of the RHC provides that where the hearing of a charge action is adjourned, the plaintiff must serve notice of the appointment for the adjourned hearing on the defendant. The plaintiff omitted to do so, and at the adjourned hearing, the matter was heard ex parte, and order in terms of the originating summons including an order for sale pursuant to the provisions of the National Land Code was made. On appeal, the Federal Court held the ex parte orders obtained were a nullity. Edgar Joseph Jr FCJ said it is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim audi alteram partem. In the instant case, the application for the appointment of the receiver was made vide an ex parte summons in chambers. The plaintiff was of the view that such an application can be made on an ex parte basis, and to date is holding on to that stand. Order 30 r 1 of the RHC does not specifically spell out that an application for the appointment of receiver has to be made inter partes but, as discussed earlier, the words 'until after the hearing of a summons for the appointment of receiver' found in O 30 r 1(4) of the RHC would, to me, denote that such an application has to be heard inter partes and thus, following what has been said in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor*, it is my view that the said ex parte order obtained by the plaintiff on 18 January 2001 is a nullity.

On the second contention raised by counsel for the first defendant, viz, that only a minority shareholder is entitled to bring a derivative action, and the plaintiff, being a majority shareholder has no locus standi to do so, I would think that case law seems to support this stand. In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors*, the Court of Appeal stated that a derivative action 'is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name'. Such an action must meet the following requirements, namely:

(a) a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company;

(b) the wrongdoers must be cited as defendants;

(c) the company must also be cited as a defendant;

(d) the title to the action must reflect that the suit is being brought in a representative capacity;

(e) the statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so;

(f) there must be an express statement in the pleading that the action is

being brought for the benefit of the company named as a defendant.

The above case seems to suggest that only a minority shareholder can bring such an action. The case of *Duffy v Super Centre Development Corp Ltd* [1967] 1 NSWR 382 also suggests the same. In that case, the Supreme Court of New South Wales appointed a receiver and manager of the assets and undertaking of a company pending the hearing of proceedings by minority shareholders against the majority shareholders over the development of a company project. In the instant case, the plaintiff is the majority shareholder of the second defendant and as such would be in the position to control the majority of the votes at a general meeting of the second defendant. Two of the directors of the second defendant were appointed by the plaintiff, the other two being appointed by Genisys, ie the only other shareholder and which holds 49% of the shares of the second defendant. The facts as presented by the plaintiff suggests there is no cooperation between the parties. The main complaint of the plaintiff is clearly against the first defendant who is the managing director, or 'chief executive officer'/'CEO', which seems to be the preferred nomenclature these days, who, pursuant to the said agreement, is in control of the day to day management of the second defendant. I would think that whatever wrongdoing that has been committed by the first defendant could be raised as part of the agenda at a general meeting of the second defendant. Steps or suggestions to protect any endangered property of the second defendant can also be resolved by the wishes of the majority shareholder at a general meeting. The plaintiff complains that the first defendant is not cooperative and is alleging he has breached his fiduciary duty as a director of the second defendant. The plaintiff is seeking injunctions to restrain him from signing cheques and from disposing or dealing with any property of the second defendant. It is also seeking orders directing the first defendant to return all monies and properties used and/or acquired by himself, if any or third parties in breach of his fiduciary duty as a director of the second defendant. I would think there are adequate remedies available to the plaintiff under the Act to overcome these complaints, including the complaint that the second defendant has not prepared its statement of accounts for the financial year ending 31 December 1999, thus breaching s 169 of the Act. For example, under s 144(1) of the Act, the plaintiff, being a member holding not less than one-tenth of the paid up capital of the second defendant, may requisition for a general meeting, and its directors, notwithstanding anything in its articles, must forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition. Section 144(3) of the Act provides that if the directors do not within 21 days after the date of the deposit of the requisition proceed to convene the meeting, the requisitionists or any of them representing one-half of the total voting rights of all of them may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors, convene a meeting. Section 145 of the Act provides two or more members holding not less than one-tenth of the issued share capital may call a meeting of the company.

Consequently, s 132C(1) of the Act provides that notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for, inter alia, the disposal of a substantial portion of the company's undertaking or property which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in the general meeting. Section 132C(2) of the Act provides that the court may, on the application of any member of the company, restrain the directors from entering into such a transaction. Section 132C(5) of the Act provides that any director who contravenes the provisions of this section shall be guilty of an offence against the Act.

As discussed earlier, the decision of the Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* seems to suggest that only a minority shareholder may bring an action on behalf of himself and all the other shareholders of a company in a derivative action. The plaintiff in the instant case is the majority shareholder. Although the wrongdoer as alleged by the plaintiff is the first defendant who, pursuant to the said agreement, is in control of the day to day management of the second defendant, I would think that the proper party to bring an action to remedy the wrongs that he has allegedly committed would be the second defendant. I do not think that the first defendant can ever prevent the second defendant from bringing an action against his goodself if that is what has been decided at a general meeting of the second defendant. Since the plaintiff, as the majority shareholder, controls the votes, it is prima facie in actual control of the second defendant. It is the second defendant which has to determine what steps it has to take against the first defendant to overcome or prevent the acts complained of against the first defendant. The plaintiff, being the majority shareholder, does not seem to fall within the contemplation of any of the exceptions to the rule in *Foss v Harbottle*, and hence would not be in a position to bring a derivative action.

For the reasons discussed above, I would set aside the said ex parte order granted on 18 January 2001 and order that the plaintiff pay the costs of this application to the first defendant.

First defendant's application allowed to set aside ex parte order obtained by plaintiff with costs.

Reported by Moy Saw Han